***THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY**

–

W.P.Nos.22527 & 22634 of 2005

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% 20.12.2005

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Between:

LG Life Sciences India Limited, Having its regd. office at LG Office, AB-3, Safdarjang Enclave, New Delhi-11-29
through its Authorised Signatory and Area Manager Mr. G. Pavan Kumar
age 29 years S/o. G.V.Krishna Reddy and another

..... PETITIONERS

AND

1 The Andhra Pradesh Health and Medical Housing and Infrastructre Development Corporation thouth its
Managing Director D.M & H.S Compound, Sultan Bazar
Hyderabad-500 095 and others

…Respondents

! Counsel for the Petitioner: Sri S. Ravi

^ COUNSEL FOR THE RESPONDENTS:

Sri M.Ravindranath Reddy,

Sri Y. Sudhakar, Standing Counsel

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> Head Note:

? CITATIONS:

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Serum Institute of India Ltd., 212/2, Hadapsar, Pune-411028 (India), rep by Sales Manager MR.R. Padma Kumar
S/o N. Radha Krishna Nair

..... PETITIONER

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COMMON JUDGMENT:

These two writ petitions are interrelated and their subject matter is common. Hence, they are disposed of through a common judgment.

Briefly stated, the relevant facts are as under:

For the sake of convenience the parties are referred to as arrayed in W.P.No.22527 of 2005. The petitioner in W.P.No.22634 of 2004 figures as 2nd respondent in W.P.No.22527 of 2005, and vice versa. The 1st respondent is common in both the writ petitions.

The 1st respondent issued a global tender on 25-05-2005, inviting tenders for the supply of Hepatitis 'B' Vaccines and certain other drugs. For the supply of this item, the petitioner, the 2nd respondent and another company, by name Shantha Bio-tech submitted their tenders. The process comprised of two stages, namely opening of technical bids and thereafter opening of financial bids, of those, who qualified in the technical bid. The technical bids were opened on 23-07-2005, and the financial bids on 27-05-2005. The 1st respondent was not satisfied as to the qualification of the petitioner in the technical bid. Therefore, it proceeded to open the financial bid of the 2nd respondent alone. The manner, in which the other tenderer was treated, is not of much relevance to these writ petitions.

The petitioner submitted a representation dated 25-07-2005 to the 1st respondent stating that it fulfilled all the conditions of the technical bid, and its financial bid ought

to have been opened. The matter was under consideration of the Tender Evaluation Committee (for short 'the Committee') of the 1st respondent. At that stage, the 2nd respondent filed W.P.No.16976 of 2005 pleading that the petitioner does not possess the requisite qualifications, to participate in the tenders and that the 1st respondent was not justified in reconsidering the technical bid of the petitioner. After discussing the matter at length, a learned single Judge of this Court disposed of that writ petition on 30-09-2005, directing the Committee of the 1st respondent to reconsider the technical bid of the petitioner. Necessary parameters in this regard were also indicated.

The technical bid of the petitioner was reconsidered by the Committee at its meeting held on 03-10-2005, and it was opined that the petitioner satisfies the conditions. Accordingly, it was decided that the financial bid of the petitioner be opened. After opening of the financial bid of the petitioner, it emerged that it quoted an amount of Rs.3,24,45,350/- as price, for 46.55 lack doses of Hepatitis 'B' vaccine, whereas the corresponding price quoted by the 2nd respondent was Rs.3,92,41,650/-. The 1st respondent issued purchase order dated 13-10-2005 in favour of the 2nd respondent for the quantity of 23,27,500 vaccines, @ Rs.6.23 ps. per unit. On the next day, he passed identical order for the same quantity in favour of the petitioner at the same price. While the petitioner challenges the purchase order dated 13-10-2005, passed in favour of the 2nd respondent, the latter challenges the order dated 14-10-2005, passed in favour of the former.

The petitioner contends that it had emerged as the lowest tenderer, after the tenders submitted by itself and the one submitted by the 2nd respondent have been opened, and that it was not legal or proper on the part of the 1st respondent, to have split the quantity. It is urged that though there is no provision for negotiations in the matter, the 1st respondent deviated from the normal procedure of starting negotiations on the basis of the rates quoted by the L-1 tenderer. Several other subsidiary contentions were also urged.

The 1st respondent filed counter affidavit in both the writ petitions. It tried to justify its action, by stating that though a doubt was expressed at the stage of opening the technical bids, as to the eligibility of the petitioner, on a further scrutiny, it was convinced that the petitioner possessed the requisite qualifications. It is pleaded that

the quantity was divided between both the parties, to ensure smooth and proper supply of an important drug, and in public interest. As regards the manner of negotiation, the 1st respondent contends that it has the discretion to do so, and that it is not mandatory in law, for the tendering agency, to accept the lowest tender.

The 2nd respondent, apart from opposing the claim of the petitioner, asserted its own right by filing a separate writ petition. It is stated that the opening of financial bid of the petitioner was contrary to law, since it does not possess the requisite qualifications. It is pleaded that after opening of the financial bid and undertaking negotiations, the rates quoted by it were found to be more economical, and that the entire contract ought to have been awarded to them.

Sri S. Ravi, learned counsel for the petitioner made extensive submissions in support of the writ petition as well as in opposition to the claim of the 2nd respondent. He contends that the procedure adopted by the 1st respondent has defeated the very sanctity of the tendering process. According to the learned counsel, the figures that emerged on opening the tenders, ought to have been the guiding factor, and the 1st respondent has deviated from the settled procedure, by starting negotiations from the rates offered by the 2nd respondent, out side the scope of tender, that too, in the form of filing an undertaking in a writ petition. He further points out that from the point of view of supply, quality, and rates, the product of the writ petitioner is superior. He made submissions, touching upon the qualifications of the petitioner, as well as the relation of the petitioner with the parent company in Korea.

Sri M. Ravindranath Reddy, learned counsel for the 2nd respondent submits that the decision taken by the Committee of the 1st respondent to open the financial bid of the writ petitioner is totally unjustified. He invited the attention of the Court to certain clauses of the tender and submitted that it is only the agencies, which have manufacturing units in India, that can participate in the tender, and not others. He further points out that once the 1st respondent has undertaken negotiations and the figure quoted by the 2nd respondent emerged as most economical, the entire contract ought to have been awarded to it.

Sri Y.Sudhakar, learned Standing Counsel for the 1st respondent states that his client followed the guidelines issued by this Court in its judgment in W.P.No.19676

of 2005, and on an objective examination of the matter, it found the writ petitioner eligible to participate in the tendering process. He contends that a conscious and most objective decision was taken in the matter of placing the orders, equally on the writ petitioner and the 2nd respondent, and no exception can be taken to it.

The submissions made by the learned counsel for the parties turn around two stages of controversy: The first is as regards the eligibility of the writ petitioner to participate, and the second is about the legality of the action of the 1st respondent in awarding the contract in favour of the writ petitioner and the 2nd respondent, for supply of drug in equal quantities. The relevant facts have already been stated, with the permissible brevity. The 1st respondent received three tenders, in response to its tender notice dated 25-05-2005. All the technical bids were opened on 23-07-2005. The 2nd respondent is qualified, in the context of opening of its financial bid. However, it entertained doubt, as to the eligibility of the writ petitioner. The basis for this doubt was that the writ petitioner is said to be a subsidiary of L.G. group of companies of Korea. A doubt arose, as to whether the writ petitioner can be treated as an independent agency or a subsidiary/agent of Korean Company. If the former course is adopted, the petitioner would not be qualified, since it did not have a manufacturing unit of its own, whether in India or elsewhere. On the other hand, if it is to be treated as a subsidiary or an agent of the parent company in Korea, the manufacturing units established by the parent company would enure to the benefit of the petitioner also.

In the ordinary course of things, the corporate veil of a company would be lifted, to the discomfort and displeasure of the company concerned. In the instant case, the petitioner wanted the 1st respondent to lift the veil to exhibit that it does not have a personality of its own, and is part of its parent company. With this contention, in substance, the petitioner filed a representation before the 1st respondent on 25-07-2005, on which day, the financial bids were to be opened.

Sensing that the 1st respondent is likely to reconsider its decision, as regards the qualification of the writ petitioner, the 2nd respondent filed W.P.No.16976 of 2005.

Because of the interim orders granted therein, the matter could not be processed further, though the price bid of the 2nd respondent was opened. After considering the contentions of both the parties, this Court disposed of the writ petition on 30-09-2005, with a direction to the 1st respondent, through its Committee, to examine the eligibility of the petitioner herein.

At its meeting held on 03-10-2005, the committee examined the matter, obviously keeping in view, the factors indicated by this Court in the judgment referred to above, and it opined that the petitioner holds the requisite qualifications. Accordingly, the financial bid of the petitioner was opened on the next day i.e.
04-10-2005. The 2nd respondent has raised serious objection as to the correctness of the decision of the Committee in treating the petitioner, as qualified. The principal contention urged in this regard is that the petitioner does not possess manufacturing unit of its own, and in that view of the matter, its financial bid ought not to have been opened.

In this context, perusal of condition 2 (a) of the tender notification becomes necessary. It reads as under:

> "Only Manufacturing units for, J.E. Vaccine and Hepatitis-B Vaccine with (Both Domestic and International Manufacturers) whose annual turnover is at least Rs.1 crore (Indian Currency) are eligible to participate in the Tender".

From this, it is evident that the manufacturing unit can be either domestic or international in nature. The very fact that global tenders were invited, is indicative of the fact that, having a manufacturing unit within India, is not a condition precedent, for submitting the tenders. The 2nd respondent has a manufacturing unit in India. Therefore, the only point of controversy that arose in this regard is, as to whether the writ petitioner has a unit either in India or in any other place in the world. For this purpose, the corporate identity of the petitioner becomes relevant.

It is the consistent case of the petitioner that it is a subsidiary of L.G limited, Korea, with 100% ownership. The 2nd respondent is not able to place any material to doubt the assertion of the petitioner or the assessment made by the Committee. Admittedly, the L.G. limited, Korea, owns a pharmaceutical manufacturing unit and the writ petitioner being a subsidiary of that company, Condition 2(a) can be said to have been complied with. The decision taken by the 1st respondent through its

Committee, completely accords with the terms of the tender notice as well as the parameters stipulated by this Court in its judgment in W.P.No.19676 of 2005.

Coming to the second aspect of the matter, while the complaint of the writ petitioner is about the breach of sanctity of the tendering process, the dissatisfaction of the 2nd respondent is about the splitting of the contract, and awarding part of it to the writ petitioner at the rates quoted by it (the 2nd respondent).

It is true that the sanctity of the tender, with specific reference to the rates quoted by the parties, has been substantially eroded in the instant case. However, it is the writ petitioner and the 2nd respondent that are to blame themselves, for such a state of affairs. On its part, the 1st respondent proceeded to open the tenders as per the schedule. Naturally, with the opening of the financial bid of the 2nd respondent, the rate quoted by it became known. In its representation made on the same day, i.e. 25-10-2005, the writ petitioner made a statement to the effect that the 1st respondent is going to sustain loss, to the tune of about Rs.1 crore, by not opening the petitioner's financial bid. Indirectly, it made known the fact that the price quoted by it is far less than that of the 2nd respondent. As a matter of fact, the 1st respondent can be said to have been provoked at this, may be bit a limited extent and made all its efforts, to neutralise the situation created by the petitioner.

When the matter was under consideration by this Court, the 2nd respondent came forward with its own counter offer, by filing an additional affidavit, obviously to steal a march over the writ petitioner. The 2nd respondent gave an undertaking in the additional affidavit, to supply the vaccine on a lesser price, than what was quoted by it, in such a way, as would benefit the 1st respondent to the tune of Rs.1,05,20,300/-. For this, a condition was imposed to the effect that the 2nd respondent be permitted, to supply the vaccine through its principal agent at Hyderabad. The net result is that the writ petitioner as well as the 2nd respondent rendered the figures quoted by them in their respective tenders; almost irrelevant. The entire scene shifted to the negotiating table.

It is, but natural that in any negotiation, the starting point would be the most beneficial figures, that emerged, before the negotiations commenced. When the counter offer made by the 2nd respondent was taken into account, the price for each

unit emerged as Rs.6.23 ps. It was not possible either for the writ petitioner or for the 2nd respondent to reduce it further. Therefore, the 1st respondent has chosen to place the purchase orders on both of them for equal quantities.

As in the case of any other contract, in the instant case also, the 1st respondent reserved to itself, the right to take a decision to subserve its own interest. Condition No.14 of the tender notice was so specific that it has even reserved to the 1st respondent, the right, to split the orders, for supplying the requirement and place them, on more than one tenderer. Transperency and objectivity is ensured, even in such matters, by insisting that the placement of the orders would be on the same conditions. Condition No.14, reads as under:

> "To ensure sustained supply without any interruption the Managing Director, Andhra Pradesh Health & Medical Housing & Infrastructure Development Corporation, reserves the right to split orders for supplying the requirements among more than one tenderer provided that, the rates and other conditions of supply are equal".

There exists a valid and substantial reason for the 1st respondent in placing the orders, equally on the writ petitioner and the 2nd respondent. The tenders were opened way back in the month of July 2005. The drug, which is sought to be purchased, is one of the most important medicines, meant to be used in the process of prevention of a dreaded decease. On account of the litigation, the supply was delayed for months together. By the time the matter was finalized, there was a delay of about three months. Obviously, to ensure smooth and uninterrupted supply and to make up the loss of time, the 1st respondent placed orders on both the parties. This Court does not find any illegality or infirmity in the course, adopted by the 1st respondent. Neither the petitioner, nor the 2nd respondent are able to point out any legal infirmity, in the respective orders, placed in favour of the other parties.

Though the learned counsel for the parties have relied upon several decisions rendered by the Supreme Court and this Court, touching upon the parameters of exercise of discretion by the tendering agency, in the matter of awarding the contracts, the necessity to refer to them, in detail, is not felt.

For the foregoing reasons, the writ petitions are dismissed. There shall be no order as to costs.

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L. NARASIMHA REDDY, J.

Dt.20-12-2005.

Note:

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